



EU-Turkey deal: 5 Years of Shame

Rule of law capture by a Statement

March 2021

Introduction

From its very inception in early March 2016, the EU-Turkey deal signed on 18 March 2016 was immediately seen for what it was: “The EU is... outsourcing its responsibilities to protect refugees to Turkey, an immoral move which allows it to circumvent its obligations under international and European asylum and human rights law. Trading in people is the dehumanising expression of a failed European asylum policy and of the lack of solidarity within the EU.”¹ The deal was falsely presented by EU leadership as a measure “to offer migrants an alternative to putting their lives at risk”² and not as a wish on the part of the EU to block departures of people from Turkey, regardless of their need for protection.³

The delivery of the deal over the past five years has come at an unspeakable cost for those seeking refuge in Europe, for local communities on the Greek islands and for the continent's moral standing. It has also driven a consistent, EU-sponsored dismantlement of legal standards at Greek and EU level that has led to a capture of fundamental safeguards enshrined in the rule of law by the short-term, narrowly conceived political aim of preventing people from reaching the EU. The steady destruction of those safeguards reflects a critical contribution of EU institutions and national governments to “rule of law backsliding” in the continent.

This Legal Note by Refugee Support Aegean (RSA) and Stiftung PRO ASYL recalls and analyses the full extent of the damaging rule of law repercussions of the EU-Turkey deal from 2016 to present, through successive restrictive legislative reforms in Greece, regular use of the islands for experimentation in asylum procedures, and evasion of legal scrutiny of the deal through its construction as a “Statement”.

Capture of law by political demand

The past five years have been marked by an unprecedented level of EU-sponsored legal re-design of the Greek asylum system, connected by the same golden thread: restricting procedural safeguards and dismantling refugee protection standards to facilitate returns from the Greek islands to Turkey under the EU-Turkey deal, regardless of flagrant violations of the rule of law and the EU *acquis*. These changes have often taken place through extensive interference of the Commission in the domestic legal order and with controversial input from consultancy firms.⁴

From the launch of the Statement to date, the Greek Parliament has passed 6 reforms of asylum legislation: L 4375/2016, L 4399/2016, L 4461/2017, L 4540/2018, L 4636/2019 (IPA), L 4686/2020. Many reforms have been passed without a public consultation.⁵ In one instance, a reform had been announced by the European Commission before the bill was even presented to Parliament.⁶

¹ European Council on Refugees and Exiles (ECRE), ‘EU-Turkey deal: trading in people and outsourcing the EU's responsibilities’, 8 March 2016, available at: <https://bit.ly/3aTCY9Q>.

² European Council, *EU-Turkey Statement*, 18 March 2016, available at: <https://bit.ly/3dN84ll>.

³ ECRE, ‘Weekly Editorial: EU-Turkey – Deconstructing the deal behind the statement’, 16 March 2018, available at: <https://bit.ly/3st4lrz>.

⁴ Balkan Insight, ‘Asylum Outsourced: McKinsey's Secret Role in Europe's Refugee Crisis’, 22 June 2020, available at: <https://bit.ly/3q9En1e>.

⁵ Consultations were launched ahead of L 4636/2019 and L 4686/2020. Only the reception component of L 4540/2018 was preceded by a consultation.

⁶ European Commission, *Second Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016) 349, 15 June 2016, 4, stating that “Greek authorities have agreed to further amend their legislation to set up the new Appeal Authority”. The bill was only presented to Parliament several hours later: Hellenic Parliament, Amendment No 496/25 15.6.2016, available at: <https://bit.ly/2Z3UAZF>.

An indicative overview of reforms is presented below:

L 4375/2016, 3 April 2016

1-day deadline for interview preparation
5-day deadline for appeal
1-day deadline for appeal hearing preparation
3-day deadline for examination of appeals

L 4461/2017, 28 March 2017

EASO rapporteurs in the Appeals Committees

L 4636/2019 (IPA), 1 November 2019

Duty to state full grounds for seeking asylum upon lodging the application
Authentication of signature required for authorisation of legal representative
Legal basis for list of safe third countries
No general exemption of vulnerable persons from the fast-track border procedure
10-day deadline for appeal
No suspensive effect of appeals on certain acceleration and inadmissibility grounds
Appeals lodged by legal document stating the full grounds for appealing a decision
Appeals Committees composed by 3 judges
Single-judge formation for certain inadmissibility and acceleration grounds
Residence attestation for appellants subject to geographical restriction on the day of examination of their appeal
Administrative Court competent for judicial

L 4399/2016, 22 June 2016

Conduct of interviews by EASO
No appeal hearing upon request
Appeals Committees composed by 2 judges and 1 UNHCR-designated expert

L 4540/2018, 22 May 2018

More means of fictitious notification of decisions
Certification of victims of torture solely by public health institutions
Replacement of Appeals Committee members in case of unjustified delays in decision-making
Reverting of applications back to the first instance authority only in discontinuation cases
Appeals Committee decision is a "final decision"
Administrative Court of Appeal competent for judicial review

L 4686/2020, 12 May 2020

More means of fictitious notification of decisions
Expansion of manifest unfoundedness grounds
Vulnerability assessment only affects reception
Single-judge formation for all inadmissibility grounds, border procedure and all island cases
Automatic pre-removal detention upon Appeals Committee rejection
Residence attestation for appellants subject to geographical restriction 2 days before examination of their appeal
No postponement of appeal examination due to absence of legal aid
Reverting of applications back to the first instance authority prohibited even where an interview is needed
Pre-removal detention as a rule for returns

The following five areas starkly reflect the steady dismantlement of the Greek asylum system as a result of the EU-Turkey deal:

Border procedures in a perpetual state of exception

The primary tool employed by the EU to deliver the return component of the EU-Turkey deal is a fast-track border procedure applied on the Greek islands,⁷ which largely derogates from procedural rules laid down in the Common European Asylum System (CEAS). The derogation regime was activated in April 2016 and has been running uninterrupted ever since, following 6 successive legislative extensions.⁸

The five past years have proven, on the one hand, that the derogation from asylum standards operated on the Greek islands is unrelated to numbers of arrivals or to exceptional circumstances. Per the EU-Turkey deal, the return of irregular migrants to Turkey was envisioned as “a temporary and extraordinary measure which is necessary to end the human suffering and restore public order”.⁹ Greek law makes it equally clear that the fast-track border procedure may only be triggered in cases of “mass arrivals of third-country nationals or stateless persons”.¹⁰

The premise that Greece has constantly operated under a “mass arrivals” situation is directly contradicted by the “game changer” mantra repeated by the EU on most occasions: “The effects of the EU-Turkey Statement were immediate... irregular arrivals remain 97% lower”.¹¹ The position taken by the Greek government echoes the contradiction. The Ministry of Migration and Asylum has repeatedly lauded a sharp decrease in arrivals in 2020.¹² And yet, Greece prolonged the fast-track border procedure until the end of 2021, with no justification beyond a provision stating “the fact that the conditions set out in Article 90, para 3 are met”.¹³

On the other hand, the procedure exceeds the boundaries set by EU law for the use of border procedures. As stressed by the Advocate-General of the Court of Justice of the EU (CJEU) in *FMS*, the EU legislature has allowed Member States to confine people at the border with a view to promptly examining their applications “with no restriction on analysing admissibility although with limited competence to assess the substance of applications”, namely in the cases falling within the grounds for applying the accelerated procedure under Article 31(8) of the Asylum Procedures Directive. Article 43 of the Directive thereby defines the border procedure as “a legal regime that forms an indissoluble whole and authorises the Member States to use the border procedures only if they comply with the conditions and guarantees it lays down”.¹⁴

The scope and volume of the fast-track border procedure bears testimony to its entrenchment into the core of the Greek system. From 2017 to 2019, in addition to inadmissibility and other decisions, the Asylum Service decided on the merits of a total

⁷ Article 90(3) L 4636/2019; Article 60(4) L 4375/2016.

⁸ Article 80(26) L 4375/2016, as subsequently amended by Article 86(20) L 4399/2016, Article 96(4) L 4485/2017, Article 28(23) L 4540/2018 and Article 7(3) L 4587/2018; Joint Ministerial Decision 1333/2019, Gov. Gazette B' 4892/31.12.2019; Joint Ministerial Decision 15996/2020, Gov. Gazette B' 5948/31.12.2020.

⁹ European Council, *EU-Turkey Statement*, para 1.

¹⁰ Article 90(3) L 4636/2019. The previous provision, Article 60(4) L 4375/2016, referred to “large numbers of third-country nationals or stateless persons”.

¹¹ European Commission, *EU-Turkey Statement: Two years on*, April 2018, available at: <https://bit.ly/3rGCPvV>; *EU-Turkey Statement: Three years on*, March 2019, available at: <https://bit.ly/3d2zfrO>.

¹² See e.g. Ministry of Migration and Asylum, *Ετήσιο ενημερωτικό σημείωμα 2020*, January 2021, available at: <https://bit.ly/3aNx0Ga>.

¹³ Recital 11 Joint Ministerial Decision 15996/2020.

¹⁴ CJEU, Joined Cases C-924/19 and C-925/19 *FMS*, Opinion, 23 April 2020, para 135.

of 23,168 asylum claims (i.e. 27% of the country's total in-merit decisions) in the fast-track border procedure,¹⁵ without having established an acceleration ground and thereby in contravention of EU law. The Commission itself recommended “maintaining and further accelerating the eligibility procedure for applicants from countries of origin with low recognition rates”.¹⁶ Whereas Article 90(1) IPA brought Greek legislation in line with Article 43 of the Asylum Procedures Directive,¹⁷ the Asylum Service and EASO continue not to comply the requirements of the Directive. The fast-track border procedure on the islands is still systematically applied in applications examined on their merits in cases which do not meet acceleration grounds.

Laboratory for EU experimentation

The Greek islands have served as an arena for experimentation of EU-sponsored pilot, often unlawful procedures and approaches to the treatment of people seeking protection with the single objective of facilitating and speeding up their deportation. Much of the experimentation attempted on the islands comes under the concept of “segmentation of case categories” into “nationality clusters”, put forward by the Commission in 2016.¹⁸ This has been used as a flagship not only for discriminating between asylum seekers based on nationality, but also for testing different models on different islands, in a way which directly undermines the EU's commitment to create harmonised, uniformly applicable protection standards through the CEAS.

Shortcuts to deportation: “workflows” in the fast-track border procedure

Since the summer of 2016, “in line with the discussions held at the 21st Management Board of EASO on 6 and 7 June 2016 and the conclusions of the JHA Council meetings of 9-10 June”, Greece has applied separate procedures to asylum seekers depending on their nationality in the fast-track border procedure:

1. **Admissibility:** Syrian nationals only undergo an assessment of the “safe third country” concept
2. **Eligibility:** Non-Syrian nationals from a country with a recognition rate under 25% undergo an eligibility procedure without a “safe third country” assessment;
3. **Merged:** Non-Syrian nationals from a country with a recognition rate over 25% undergo both admissibility and eligibility.

As detailed above, the assessment of the merits of claims in the fast-track border procedure has been applied in violation of the standards set by Article 43 of the Asylum Procedures Directive. The EASO Operating Plans 2017 and 2018 incorrectly stated that this implemented Article 31(8) of the Directive, since the grounds for accelerated processing were never established.

Discriminatory deprivation of liberty

Since 2017, asylum seekers coming from certain countries of origin have been immediately placed in detention on islands, solely on the basis of their nationality. The “low recognition rate” scheme has been applied differently in the islands with operational pre-removal centres: on Lesbos, it covered nationalities subject to a first instance recognition rate below 25%, whereas on Kos it covered countries subject to a rate below 33%.

On Chios, the Police automatically detained single Syrian men in the police station. This was also the case on Lesbos. On Kos, starting 2020, all new arrivals except for persons evidently falling within vulnerability categories were detained in the pre-removal centre.

Blueprint for the Screening proposal: admissibility questions in the “de-briefing” form

A new registration form akin to the de-briefing form presented in the Screening Regulation was introduced in Chios and Evros at the end of 2020, where the lodging of the asylum claim is done by the Reception and Identification Service, not asylum authorities.

The form includes entries touching upon the admissibility of the claim based on the “safe third country” concept, asking the applicant to state the full reasons why they do not wish to return to the country of previous residence.

¹⁵ AIDA, *Country Report Greece*, available at: <https://bit.ly/3jCunuO>.

¹⁶ European Commission, *Joint Action Plan on the implementation of the EU-Turkey Statement*, COM(2016) 792, 8 December 2016, para 5.

¹⁷ The previous provision, Article 60(1) L 4375/2016, was incompatible with the Directive.

¹⁸ European Commission, *Joint Action Plan on the implementation of the EU-Turkey Statement*, COM(2016) 792, 8 December 2016, para 4.

Disregarding rights and individualised assessments

The EU-Turkey deal has had palpable transformative effect on individual rights and the quality of refugee status determination in Greece. Restrictive legal reforms and ensuing practice over the past five years are a direct consequence of the 2016 statement.

As the fast-track border procedure constitutes the default framework for those arriving on the islands, for a large part of the country's asylum-seeking population the Greek asylum system entails a substandard process with truncated deadlines,¹⁹ disregard of special needs,²⁰ under a regime of prolonged confinement in squalid living conditions and/or arbitrary deprivation of liberty documented all too well. The European Court of Human Rights (ECtHR) is currently examining numerous cases relating to the compatibility of reception conditions on the islands of Lesbos, Chios, Samos and Kos with human rights,²¹ and has delivered judgments in respect of detention on Chios.²²

Severe criticisms have been levelled in particular against the use of the “safe third country” concept to dismiss claims by Syrian nationals as inadmissible, at all instances of the Greek asylum process. 2,869 claims were dismissed by the Asylum Service on “safe third country” grounds from 2016 to 2019,²³ and another 2,839 in 2020 alone.²⁴ The Asylum Service issues standardised inadmissibility decisions to Syrian nationals with quasi-identical contents and no assessment of asylum seekers' particular circumstances, including gender, membership of ethnic minorities or origin from areas directly targeted by the Turkish State.²⁵ For their part, the Appeals Committees uphold inadmissibility decisions in the overwhelming majority of cases, while Administrative Courts performing judicial review have not annulled decisions based on incorrect application of the concept.²⁶ The examination of Greece's treatment of “safe third country” cases is also pending before the ECtHR.²⁷

Asylum authorities continue to cite diplomatic assurances provided by Turkish authorities in April 2016 in the form of letters to the European Commission, where Turkey stated the possibility in general for Syrian nationals to gain access to the temporary protection regime upon return from Greece, despite several changes to Turkey's legal framework, an array of reliable reports pointing to risks of *refoulement*, including

¹⁹ See e.g. RSA, 'The conduct of (remote) asylum interviews on Lesbos', 8 December 2020, available at: <https://bit.ly/371yfAE>.

²⁰ See e.g. RSA, PRO ASYL & MSF, 'Border procedures on the Greek islands violate asylum seekers' right to procedural guarantees', February 2021, available at: <https://bit.ly/3smAQgD>.

²¹ ECtHR, *A.R. and others v. Greece*, App No 59841/19, Communicated 4 January 2021; *N.A. v. Greece*, App No 11216/20, Communicated 4 January 2021.

²² ECtHR, *Kaak v. Greece*, App No 34215/16, 3 October 2019; *J.R. v. Greece*, App No 22696/16, 25 January 2018.

²³ AIDA, *Country Report Greece*.

²⁴ Ministry of Migration and Asylum, *Ετήσιο ενημερωτικό σημείωμα 2020*, January 2021.

²⁵ RSA & Stiftung PRO ASYL, *Submission in M.S.S. and Rahimi*, July 2020, para 30, available at: <https://bit.ly/3tQBBjo>; Yiota Massouridou, *Legal Opinion on the case law of the Greek Appeals Committees and Administrative Courts with regard to the application of the “safe third country” concept*, July 2019, available at: <https://bit.ly/2Wz6mub>.

²⁶ *Ibid.* See e.g. Administrative Court of Appeal of Piraeus, Decision A528/2018, 15 October 2018; Decision A559/2018, 1 November 2018.

²⁷ ECtHR, *J.B. v. Greece*, App No 54769/16, Communicated 18 May 2017.

Turkey's involvement in causing forced displacement from Syria,²⁸ and the absence of monitoring mechanisms to verify compliance with such assurances since then.²⁹

Constricting vulnerability

Legislation adopted in 2016 foresaw an exemption of vulnerable persons from the fast-track border procedure.³⁰ Persons exempted therefrom have their geographical restriction on the islands lifted and are referred to the mainland to continue their asylum procedure. In practice, for those managing to undergo vulnerability assessment procedures, this has been the sole way to exit the island on which they have been confined. Practice varied from time to time due to legal uncertainty and depending on the availability of personnel and infrastructure.³¹

Rather than encouraging the establishment of a workable vulnerability identification system to ensure effective protection of the most vulnerable cases, the EU has put significant political pressure on Greece to limit the recognition of asylum seekers as vulnerable. This has notably concerned persons suffering from post-traumatic stress disorder such as shipwreck survivors, so as to avoid exempting them from the fast-track border procedure.³² This came after the Commission unsuccessfully urged Greece to subject vulnerable asylum seekers to the fast-track border procedure and to the "safe third country" concept.³³

Pressure to constrict vulnerability was reflected in subsequent legislative reforms declaring that victims of torture may only be certified by public health institutions.³⁴ Certification has thereby become 'dead letter', since public health authorities on the islands have no established services and processes to date to carry it out.³⁵ As a result, many victims of torture or serious violence have been left unidentified and deprived of appropriate reception conditions and procedural safeguards. The IPA has maintained that provision and repealed the general exemption of vulnerable persons from the fast-track border procedure, providing that exemption from the border procedure may only be ordered where "adequate support" cannot be provided to an applicant in need of special procedural guarantees.³⁶

²⁸ This has been cited as a ground for not applying the "safe third country" concept by a limited number of Appeals Committee decisions: 4th Appeals Committee, Decision 4038/2020, 16 March 2020; 3441/2020, 16 March 2020; Appeals Committee, Decision 28217/2020, 17 December 2020; 20th Appeals Committee, Decision 29118/2020, 19 January 2021.

²⁹ RSA & Stiftung PRO ASYL, *Submission in M.S.S. and Rahimi*, July 2020, para 31.

³⁰ Article 60(4)(f) L 4375/2016, citing Article 14(8) L 4375/2016.

³¹ From 2016 to 2019, out of 128,725 asylum seekers initially channelled into the fast-track border procedure, 65,681 were exempted from the fast-track border procedure for reasons of vulnerability. In 2020, during which 21,879 applicants were initially placed in the fast-track border procedure, the authorities lifted the geographical restriction in 5,543 cases: AIDA, *Country Report Greece, 2020 Update*, forthcoming.

³² Human Rights Watch, 'EU/Greece: Pressure to Minimize Numbers of Migrants Identified As Vulnerable', 1 June 2017, available at: <http://bit.ly/2qD2fQb>. See also Kathimerini, 'Greek islanders are 'heroes,' says Commission VP', 29 October 2017, available at: <https://bit.ly/3qo33Co>.

³³ European Commission, *Joint Action Plan on the implementation of the EU-Turkey Statement*, COM(2016) 792, 8 December 2016, para 3.

³⁴ Article 23(1) L 4540/2018; Article 61(1) IPA.

³⁵ RSA et al., *The Workings of the Screening Regulation*, January 2021, 16-17, available at: <https://bit.ly/3eoeV54>.

³⁶ Article 67(3) IPA.

Remedies only in name: neutralising appeal and judicial review

The constant reform of Greek asylum law driven by the delivery of the EU-Turkey deal has heavily targeted rule of law safeguards in the Greek appeal system. On the one hand, successive legislative amendments have interfered with the institutional structure of the three-member Appeals Committees,³⁷ the administrative bodies competent for examining asylum claims at second instance:

Appeals Committees PD 113/2013	Backlog Appeals Committees PD 114/2010	Independent Appeals Committees L 4399/2016	Independent Appeals Committees L 4636/2019 (IPA)
Ministry of Interior official UNHCR-appointed expert NCHR-appointed expert	Ministry of Interior official UNHCR-appointed expert NCHR-appointed expert	Administrative judge Administrative judge UNHCR-appointed	Administrative judge Administrative judge Administrative judge

The independence of the Appeals Committees has been undermined by regular interference from the EU executive and the Greek legislature. At the end of 2016, the European Commission called on Appeals Committees “to increase the number of decisions per committee”,³⁸ as did a draft version of the European Council’s October 2016 conclusions referring to “enhancing the efficiency and speed of appeals procedures”.³⁹ After the Commission urged the “Greek authorities to adopt the necessary legal provisions as soon as possible”, L 4461/2017 and L 4540/2018 placed further constraints on the Committees e.g. through provisions allowing for the replacement of Committee members who do not promptly decide on appeals.⁴⁰

At the same time, reforms have directly curtailed the accessibility and effectiveness of the Appeals Committee procedure as a remedy against Asylum Service decisions. Legislative and administrative changes over the past five years have:

- Introduced appeal deadlines as short as 5 – now 10 – days in the fast-track border procedure;
- Excluded asylum seekers who exercise their right to appeal from assisted voluntary return programmes;⁴¹
- Introduced additional admissibility requirements for appeals, to be lodged by a legal document stating the full grounds for appealing an Asylum Service decision, despite the consistent inability of the state to discharge its obligation to provide appellants with legal aid;⁴²

³⁷ Note that, under Article 80 L 4375/2016, the Backlog Appeals Committees established under PD 114/2010 were initially competent for examining appeals, prior to L 4399/2016.

³⁸ European Commission, *Joint Action Plan on the implementation of the EU-Turkey Statement*, COM(2016) 792, 8 December 2016, para 9.

³⁹ Council of the European Union, *European Council Draft Conclusions (20-21 October 2016)*, 1122/16, 17 October 2016, available at: <https://bit.ly/3rlDUDp>. The final text refers to “asylum procedures”.

⁴⁰ Article 5 L 4375/2016, as amended.

⁴¹ Hellenic Police, ‘Υλοποίηση Κοινής Δήλωσης Ε.Ε.-Τουρκίας (Βρυξέλλες, 18-03-2016) -Συμμετοχή αλλοδαπών υπηκόων αιτούντων τη χορήγηση καθεστώτος διεθνούς προστασίας στα προγράμματα οικειοθελούς επαναπατρισμού του Διεθνούς Οργανισμού Μετανάστευσης (Δ.Ο.Μ.)’, Circular 1604/17/681730, 3 April 2017, available at: <http://bit.ly/2E8Mlmr>. This measure was taken following recommendations from the European Commission: *Joint Action Plan on the implementation of the EU-Turkey Statement*, COM(2016) 792, 8 December 2016, para 13.

⁴² RSA & Stiftung PRO ASYL, *Submission in M.S.S. and Rahimi*, July 2020, paras 16-26.

- Stripped several categories of appeals of automatic suspensive effect, thereby requiring individuals to lodge a separate request for suspensive effect pending the completion of the appeal procedure;⁴³
- Eliminated the granting of an oral hearing before the Committees upon request by the appellant, thereby confining the appeal procedure to a process *sur dossier*;
- Eliminated collegial decision-making, as all appeals lodged on the islands are examined by the Committees in single-judge format;
- Forbidden the Committees from postponing the examination of appeals where no legal aid has been provided to the applicant, unless they determine the existence of procedural damage and a tangible prospect of success;
- Forbidden the Committees from reverting cases back to the Asylum Service, even where an interview has to take place, as illustrated in the cases of Syrian applicants who are only interviewed on admissibility grounds at first instance.

Nevertheless, the Council of State⁴⁴ ruled in 2017 that the Independent Appeals Committees satisfy the requirements set by Article 46 of the Asylum Procedures Directive for access to an effective remedy before a court or tribunal, despite the fact that the structure and composition of Committees does not mirror the safeguards applicable to judicial authorities, and even though the Committees operate as a rule a written procedure.⁴⁵

On the other hand, whereas in 2016 the European Commission recommended “limiting appeal steps in the context of the asylum procedure”,⁴⁶ stripping asylum seekers from the sole remedy available before a court would contravene the minimum standards of judicial protection set by the Greek Constitution. Instead, the Greek legislature amended the rules of judicial review by the administrative courts by setting deadlines for courts to decide on applications for annulment and requests for suspensive effect.⁴⁷ Concerns related to breach of the principle of impartiality, due to the parallel participation of administrative judges in both Appeals Committees and the courts competent for reviewing Committee decisions, were dismissed by the Council of State in 2017.⁴⁸

Further interference with rule of law guarantees came with the transfer of judicial review competence from Administrative Courts of Appeal to the first-instance Administrative Courts of Athens and Piraeus under the IPA in 2019. Pursuant to the current judicial review structure, an Administrative Court conducts judicial review of decisions that may be – and often are – taken by Committees composed by higher-level administrative judges. The reversal of the established structure of the judiciary in instances, from lower to higher judges, is an unprecedented development in Greece and the EU and jeopardises judicial hierarchy as a guarantee of independence and

⁴³ This is a superfluous step, as the Committees end up dismissing requests for suspensive effect as having no object (*άνευ αντικειμένου*), after having issued a positive or negative decision on the merits of the appeal: 4th Appeals Committee, Decision 12645/2020, 21 July 2020; 6th Appeals Committee, Decision 5692/2020, 28 February 2020; 10th Appeals Committee, Decision 7465/2020, 24 April 2020; 13th Appeals Committee, Decision 2727/2020, 9 April 2020; 19th Appeals Committee, 19883/2020, 11 August 2020. See further RSA, *Comments on the amended Commission proposal for an Asylum Procedures Regulation*, October 2020, 10, available at: <https://bit.ly/3pMUvGe>.

⁴⁴ This was prior to the transfer of judicial review competence to lower courts.

⁴⁵ Council of State, Decisions 2347/2017 and 2348/2017, 22 September 2017.

⁴⁶ European Commission, *Joint Action Plan on the implementation of the EU-Turkey Statement*, COM(2016) 792, 8 December 2016, para 10.

⁴⁷ Article 15(3) and (5) L 3068/2002, as amended by Article 29 L 4540/2018.

⁴⁸ Council of State, Decisions 2347/2017 and 2348/2017, 22 September 2017.

impartiality. The Council of State will soon deliver a pilot judgment on the constitutionality of the relevant provisions.⁴⁹

Asylum decision-making at second and higher instance seems to confirm the damaging effects of the EU-Turkey deal on the quality and effectiveness of judicial protection for people seeking asylum in Greece. The rate of positive Independent Appeals Committee decisions on the merits of appeals dropped from 30.4% in the period 1 January to 20 July 2016 to no more than 0.5% in the period 21 July to 31 December 2016, 2.8% in 2017, 4.4% in 2018, 5.9% in 2019 and 5.2% in 2020.⁵⁰ As for judicial review, according to available statistics for 2020, only 1.8% of decisions were positive.⁵¹

Dismantlement of legality at EU level

“Not EU”

The European Council successfully claimed before the General Court of the EU (GCEU) that the statement summarises the outcome of a meeting between Heads of State or Government and thereby is “merely a political commitment of the Heads of State or Government of the Member States of the European Union vis-à-vis their Turkish counterpart”.⁵² The presence of the President of the European Council and the President of the European Commission, “not formally invited” to the meeting, played no part in the eyes of the GCEU.⁵³

The tenuous reasoning put forward by EU leadership before the Court has been contradicted by EU institutions since the very launch of the statement. First, the European Council called on the EU to assume responsibility for the implementation of the statement as early as 18 March 2016: “The European Council asks the Commission to coordinate all necessary support for Greece, for the full implementation of the EU-Turkey statement, and to develop an operational plan. The Commission will coordinate and organise together with Member States and agencies the necessary support structures to implement it effectively. The Commission will regularly report to the Council on its implementation.”⁵⁴ Since then, the European Council explicitly cited the EU-Turkey statement in 6 more conclusions.⁵⁵

Second, at the behest of the European Council, the European Commission has designated an EU Coordinator for the implementation of the Statement, established operational presence on the islands and coordinated the deployment of Frontex and European Asylum Support Office (EASO) experts for the purpose of implementing the statement. The Commission has also led on the allocation of €6bn in EU financial support to Turkey under the EU Facility for Refugees in Turkey,⁵⁶ and published 7 progress

⁴⁹ RSA, ‘The Council of State pilot procedure on judicial review in the asylum procedure’, 1 February 2021, available at: <https://bit.ly/3pashn5>.

⁵⁰ AIDA; *Country Report Greece*; RSA, ‘Asylum statistics for 2020 A need for regular and transparent official information’, 12 February 2021, available at: <https://bit.ly/3bFmbGK>.

⁵¹ RSA, ‘Asylum statistics for 2020 A need for regular and transparent official information’, 12 February 2021.

⁵² GCEU, T-192/16 NF, 28 February 2017, para 60.

⁵³ *Ibid.*, para 67.

⁵⁴ European Council, *Conclusions (17 and 18 March 2016)*, EUCO 12/1/16 REV 1, para 2.

⁵⁵ European Council, *Conclusions (28 June 2016)*, EUCO 26/16, para 1; *Conclusions (21 October 2016)*, EUCO 31/16, para 5; *Conclusions (15 December 2016)*, EUCO 34/16, para 1; *Conclusions (22 and 23 June 2017)*, EUCO 8/17, *Conclusions (28 June 2018)*, EUCO 9/18, para 20; para 4; *Conclusions (18 October 2018)*, EUCO 13/18, para 5.

⁵⁶ European Commission, *Fourth Annual Report on the Facility for Refugees in Turkey*, COM(2020) 162, 30 April 2020.

reports on the implementation of the EU-Turkey statement until September 2017.⁵⁷ The Council has also directly issued guidance on the implementation of the statement by national authorities and EASO in Greece.⁵⁸

Third, the Council cited the EU-Turkey statement in EU legislation when it amended the 2015 Relocation Decisions to allow Member States to meet their set share by resettling Syrian refugees from Turkey.⁵⁹ The launch of the deal on 20 March 2016 also served as a *de facto* cut-off date to relocation of asylum seekers from Greece under the Relocation Decisions.⁶⁰

"Only a statement"

Over the past 5 years, the EU has insisted that the EU-Turkey statement is a press release carrying no legal effects for either Greece or Turkey. Ostensibly, the implementation of provisions of the statement e.g. on the return of irregular migrants entering the Greek islands does not affect existing obligations imposed on Greece by the EU *acquis*.

This fiction is also dispelled in at least two respects. First, the reference to the "Greek islands" in the EU-Turkey deal is construed as a necessary precondition for Turkey to readmit persons from Greece. Hence, a "geographical restriction" regime has been instituted for asylum seekers subject to the deal. Greek legislation governing the geographical restriction explicitly refers to public interest grounds for interfering with the right to freedom of movement, based on the implementation of the EU-Turkey statement for which "the imposition of restrictions on the freedom of movement of applicants for international protection who enter the Greek territory through the islands of Lesbos, Rhodes, Samos, Kos, Leros and Chios after 20 March 2016, the date of launch of the statement".⁶¹

Second, the EU-Turkey deal is construed as a free-standing legal basis for readmissions to Turkey. The Statement is expressly cited in all deportation decisions issued on the islands. The EU consistently criticises Turkey for not yet implementing the EU-Turkey Readmission Agreement as regards third-country nationals.⁶² The Commission has also conceded that Turkey has suspended its bilateral readmission protocol with Greece in 2018.⁶³ This means that returns from the islands to Turkey, which continued until March 2020, are not based on any readmission agreement but take place directly under the EU-Turkey deal. Illustratively, the Commission reports returns under the Statement separately from the implementation of readmission agreements.⁶⁴

⁵⁷ European Commission, *Seventh Report on the Progress made in the implementation of the EU-Turkey Statement*, COM(2017) 470, 6 September 2017.

⁵⁸ Council of the European Union, *Justice and Home Affairs Council (9-10 June 2016)*, cited in European Asylum Support Office (EASO), *Operating Plan to Greece 2017*, December 2016, 8, available at: <https://bit.ly/3pQJJgS>.

⁵⁹ Recital 4 Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2016] OJ L268/82.

⁶⁰ Only in mid-2017 did the Commission clarify that the EU-Turkey deal did not affect the eligibility of asylum seekers for relocation: European Commission, Reply to parliamentary question E-003985/2017, 11 August 2017.

⁶¹ Recital 11(c) Ministry of Citizen Protection Decision 1140/2019, Gov. Gazette B' 4736/20.12.2019; Recital 11(c) Asylum Service Director Decision 8269/2018, Gov. Gazette B' 1366/20.04.2018. See also Council of State, Decision 805/2018, referring to Asylum Service Director Decision 10464/2017, Gov. Gazette B' 1977/07.06.2017.

⁶² European Commission, *Turkey 2020 Report*, SWD(2020) 355, 6 October 2020, 42; *Turkey 2019 Report*, SWD(2019) 220, 29 May 2019, 40-41; *Turkey 2018 Report*, SWD(2018) 153, 17 April 2018, 41; European Council, *Conclusions (19 October 2017)*, EUCO 14/17, para 3.

⁶³ European Commission, *Turkey 2020 Report*, SWD(2020) 355, 6 October 2020, 48.

⁶⁴ European Commission, *Turkey 2020 Report*, SWD(2020) 355, 6 October 2020, 49; *Turkey 2019 Report*, SWD(2019) 220, 29 May 2019, 47.

Conclusion

The destructive effects of the EU-Turkey deal on the rule of law and refugee protection in Greece have regrettably proved to be all but “a temporary and extraordinary measure”. In the five years following the launch of the Statement, the EU, in particular Commission and Council, have sought to entrench the very elements of the deal that led to the dismantling of the Greek asylum system, as outlined above, into EU legislation so as to replicate them across the continent.

The proposals made in the New Pact on Migration and Asylum and the 2016 asylum package tabled by the Commission are a stark illustration of those efforts. The EU legislature is called to negotiate a multi-dimensional expansion of border procedures and corollary deprivation of liberty at borders, a severe lowering of “safe third country” criteria, and constraints on national judicial systems aimed at depriving asylum seekers of judicial protection.⁶⁵ Resisting these reforms is indispensable to safeguarding the rule of law in the EU.

⁶⁵ RSA, *Comments on the amended Commission proposal for an Asylum Procedures Regulation*, October 2020, available at: <https://bit.ly/2ZYCxVc>.



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